

FIRST REGULAR SESSION

SENATE BILL NO. 291

93RD GENERAL ASSEMBLY

INTRODUCED BY SENATORS MAYER, CAUTHORN, CLEMENS, RIDGEWAY, SCOTT,
GRIESHEIMER, KLINDT, VOGEL, PURGASON, CROWELL AND SHIELDS.

Read 1st time February 3, 2005, and ordered printed.

TERRY L. SPIELER, Secretary.

1402S.011

AN ACT

To repeal sections 290.210, 290.262, 290.290, 290.305, and 290.340, RSMo, and to enact in lieu thereof eleven new sections relating to public contracts.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 290.210, 290.262, 290.290, 290.305, and 290.340, RSMo, are repealed and eleven new sections enacted in lieu thereof, to be known as sections 34.203, 34.206, 34.209, 34.212, 34.215, 290.210, 290.262, 290.290, 290.305, 290.326, and 290.340, to read as follows:

34.203. The provisions of sections 34.203 to 34.215 shall be known and may be cited as the "Open Contracting Act".

34.206. The purpose of sections 34.203 to 34.215 is to fulfill the state's proprietary objectives in maintaining and promoting the economical, nondiscriminatory, and efficient expenditures of state funds in connection with state and state-funded or assisted construction projects.

34.209. Any state or political subdivision, agency, or instrumentality thereof, when engaged in procuring products or services or letting contracts for manufacture of public works, or overseeing such procurement, construction, or manufacture, shall ensure that bid specification, project agreements, and other controlling documents entered into, required, or subject to approval by the subdivision, agency, or instrumentality do not:

(1) Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations on the same or related projects;

(2) Discriminate against bidders, offerors, contractors, or subcontractors for entering or refusing to become or remain signatories or otherwise adhere to

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

agreements with one or more labor organizations on the same or related construction projects;

(3) Require or prohibit any bidder, offeror, contractor, or subcontractor to enter into, adhere to, or enforce any agreement that requires its employees as a condition of employment to:

(a) Become members of or become affiliated with a labor organization; or

(b) Pay dues or fees to a labor organization, over an employee's objection, in excess of the employee's share of labor organization costs relating to collective bargaining, contract administration, or grievance adjustment.

Nothing in sections 34.203 to 34.215 shall prohibit employers or other parties covered by the National Labor Relations Act from entering into agreements or engaging in any other activity arguable protected by law, nor shall any aspect of sections 34.203 to 34.215 be interpreted in such a way as to interfere with the labor relations of parties covered by the National Labor Relations Act.

34.212. 1. The state, any political subdivision of the state, or any agency or instrumentality thereof shall not issue grants or enter into cooperative agreements for construction projects, a condition of which requires that bid specifications, project agreements, or other controlling documents pertaining to the grant or cooperative agreement contain any of the elements specified in section 34.209.

2. The state, any political subdivision of the state, or any agency or instrumentality thereof shall exercise such authority as may be required to preclude a grant recipient or party to a cooperative agreement from imposing any of the elements specified in section 34.209 in connection with any grant or cooperative agreement awarded or entered into. Nothing in sections 34.203 to 34.215 shall prohibit contractors or subcontractors from voluntarily entering into agreements described in section 34.209.

34.215. Any interested party, including a bidder, offeror, contractor, subcontractor, or taxpayer, shall have standing to challenge any bid specification, project agreement, controlling document, grant, or cooperative agreement which violates the provisions of sections 34.203 to 34.215, and shall be awarded costs and attorney's fees if the challenge prevails.

290.210. As used in sections 290.210 to 290.340, unless the context indicates otherwise:

(1) "Construction" includes construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair.

(2) "Department" means the department of labor and industrial relations.

(3) "Locality" means the county where the physical work upon public works is performed, except that if there is not available in the county a sufficient number of competent

skilled workmen to construct the public works efficiently and properly, "locality" may include two or more counties adjacent to the one in which the work or construction is to be performed and from which such workers may be obtained in sufficient numbers to perform the work, and that, with respect to contracts with the state highways and transportation commission, "locality" may be construed to include two or more adjacent counties from which workmen may be accessible for work on such construction.

(4) "Maintenance work" means the repair, but not the replacement, of existing facilities when the size, type or extent of the existing facilities is not thereby changed or increased.

(5) "Prevailing hourly rate of wages" means the wages paid generally, in the locality in which the public works is being performed, to workmen engaged in work of a similar character including the basic hourly rate of pay and the amount of the rate of contributions irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan or program, and the amount of the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workmen and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the workmen affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal or state law to provide any of the benefits; provided, that the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the department, insofar as sections 290.210 to 290.340 are concerned, may be discharged by the making of payments in cash **for hours worked, whether paid on an hourly or per diem basis or a combination of both**, by the making of irrevocable contributions to trustees or third persons as provided herein, by the assumption of an enforceable commitment to bear the costs of a plan or program as provided herein, or any combination thereof, where the aggregate of such payments, contributions and costs is not less than the rate of pay plus the other amounts as provided herein.

(6) "Public body" means the state of Missouri or any officer, official, authority, board or commission of the state, or other political subdivision thereof, or any institution supported in whole or in part by public funds.

(7) "Public works" means all fixed works constructed for public use or benefit or paid for wholly or in part out of public funds **where the estimated cost of the contract exceeds twenty-five thousand dollars**. It also includes any work done directly by any public utility company when performed by it pursuant to the order of the public service

commission or other public authority whether or not it be done under public supervision or direction or paid for wholly or in part out of public funds when let to contract by said utility. does not include any work done for or by any drainage or levee district.

(8) "Workmen" means laborers, workmen [and] , **apprentices, mechanics, and other individuals performing work covered by an occupational title, regardless of any classification based on experience.**

290.262. 1. Except as otherwise provided in section 290.260, the department shall annually investigate and determine the prevailing hourly rate of wages in each locality for each separate occupational title. A final determination applicable to every locality to be contained in an annual wage order shall be made annually on or before July first of each year and shall remain in effect until superseded by a new annual wage order or as otherwise provided in this section. In determining prevailing rates, the department shall ascertain and consider the [applicable wage rates established by collective bargaining agreements, if any, and the rates that are paid generally within the locality, and] **following criteria:**

(1) **Wage rates paid on previous public works constructed in the locality;**
and

(2) **Wage rates paid on reasonably comparable private construction projects constructed in the locality.**

In considering the rates, the department shall ascertain, insofar as practicable, the names and addresses of the contractors, including subcontractors, the respective wage rates paid, and hours worked by all workmen who were engaged in the construction of these projects. The prevailing wage rate will be the weighted average of wage rates paid to workmen for each separate occupational title. The weighted average will be calculated by adding the wages paid to workmen performing work covered by the occupational title and dividing the total number of hours worked by said workmen in that occupational title. Evidence of wage rates paid and hours worked on projects shall be established only by payroll records maintained by contractors and subcontractors on said projects. Wages paid or hours worked that are not substantiated by payroll records shall not be counted or considered in the determination of the prevailing wage rate. In the event that there are no reported hours worked for an occupational title within the locality since the time of the previous final determination, then the prevailing wage rate for that occupational title shall be that established by the previous final determination subject to a cost-of-living adjustment based upon the federal Consumer Price Index. The department shall, by March tenth of each year, make an initial determination for each occupational title within the locality.

2. A certified copy of the initial determinations so made shall be filed immediately with the secretary of state and with the department in Jefferson City. Copies shall be

supplied by the department to all persons requesting them within ten days after the filing.

3. At any time within thirty days after the certified copies of the determinations have been filed with the secretary of state and the department, any person who is affected thereby may object in writing to a determination or a part thereof that he deems objectionable by filing a written notice with the department, stating the specific grounds of the objection. If no objection is filed, the determination is final after thirty days.

4. After the receipt of the objection, the department shall set a date for a hearing on the objection. The date for the hearing shall be within sixty days of the receipt of the objection. Written notice of the time and place of the hearing shall be given to the objectors at least ten days prior to the date set for the hearing.

5. The department at its discretion may hear each written objection separately or consolidate for hearing any two or more written objections. At the hearing the department shall first introduce in evidence the investigation it instituted and the other facts which were considered at the time of the original determination which formed the basis for its determination. The department, or the objector, or any interested party, thereafter may introduce [any] evidence **allowed under subsection 1 of section 290.262** that is material to the issues.

6. Within twenty days of the conclusion of the hearing, the department shall rule on the written objection and make the final determination that it believes the evidence warrants. Immediately, the department shall file a certified copy of its final determination with the secretary of state and with the department and shall serve a copy of the final determination on all parties to the proceedings by personal service or by registered mail.

7. This final decision of the department of the prevailing wages in the locality for each occupational title is subject to review in accordance with the provisions of chapter 536, RSMo. Any person affected, whether or not the person participated in the proceedings resulting in the final determination, may have the decision of the department reviewed. The filing of the final determination with the secretary of state shall be considered a service of the final determination on persons not participating in the administrative proceedings resulting in the final determination.

8. At any time before trial any person affected by the final determination of the department may intervene in the proceedings to review under chapter 536, RSMo, and be made a party to the proceedings.

9. Any annual wage order made for a particular occupational title in a locality may be altered once each year, as provided in this subsection. The prevailing wage for each such occupational title may be adjusted on the anniversary date of any collective bargaining agreement which covers all persons in that particular occupational title in the locality in accordance with any annual incremental wage increases set in the collective bargaining agreement. If the prevailing wage for an occupational title is adjusted pursuant to this

subsection, the employee's representative or employer in regard to such collective bargaining agreement shall notify the department of this adjustment, including the effective date of the adjustment. The adjusted prevailing wage shall be in effect until the next final annual wage order is issued pursuant to this section. The wage rates for any particular job, contracted and commenced within sixty days of the contract date, which were set as a result of the annual or revised wage order, shall remain in effect for the duration of that particular job.

10. In addition to all other reporting requirements of sections 290.210 to 290.340, each public body which is awarding a contract for a public works project shall, prior to beginning of any work on such public works project, notify the department, on a form prescribed by the department, of the scope of the work to be done, the various types of craftsmen who will be needed on the project, and the date work will commence on the project.

290.290. 1. The contractor and each subcontractor engaged in any construction of public works shall keep full and accurate records clearly indicating the names, occupations and crafts of every workman employed by them in connection with the public work together with an accurate record of the number of hours worked by each workman and the actual wages paid therefor. The payroll records required to be so kept shall be open to inspection by any authorized representative of the contracting public body or of the department at any reasonable time and as often as may be necessary and such records shall not be destroyed or removed from the state for the period of one year following the completion of the public work in connection with which the records are made.

2. Each contractor and subcontractor shall file with the contracting public body upon completion of the public work and prior to final payment therefor an affidavit stating that he had fully complied with the provisions and requirements of this chapter[,] and **that he had paid all covered employees the prevailing rates specified for the public work, without benefit of a wage subsidy, bid supplement, or rebate received, directly or indirectly, from employees, labor organizations, or any other third party on the same or any other project.** No public body shall be authorized to make final payment until such affidavit is filed therewith in proper form and order.

3. Each contractor and subcontractor engaged in any construction of public works shall have its name, acceptable abbreviation or recognizable logo and the name of the city and state of the mailing address of the principal office of the company, on each motor vehicle and motorized self-propelled piece of equipment which is used in connection with such public works project during the time the contractor or subcontractor is engaged on such project. The sign shall be legible from a distance of twenty feet but the size of the lettering need not be larger than two inches. In cases where equipment is leased or where affixing a legible sign to the equipment is impractical, the contractor may place a temporary stationary sign, with the information required pursuant to this subsection, at the main entrance of the construction project in place of affixing the required information on the equipment so long

as such sign is not in violation of any state or federal statute, rule or regulation. Motor vehicles which are required to have similar information affixed thereto pursuant to requirements of a regulatory agency of the state or federal government are exempt from the provisions of this subsection.

4. The provisions of subsection 3 of this section shall not apply to construction of public works for which the contract awarded is in the amount of two hundred fifty thousand dollars or less.

290.305. No person, firm or corporation shall violate the wage provisions of any contract contemplated in sections 290.210 to 290.340 or suffer or require any employee to work for less than the rate of wages so fixed, or violate any of the provisions contained in sections 290.210 to 290.340. Where workmen are employed and their rate of wages has been determined as provided in sections 290.210 to 290.340, no person, either for himself or any other person, shall request, demand or receive, either before or after such workman is engaged, that such workman pay back, return, donate, contribute, or give any part or all of said workman's wages, salary, or thing of value, to any person, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent such workman from procuring or retaining employment, and no person shall, directly or indirectly, pay, request or authorize any other person to violate this section. This section does not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization. **Assessments permitted under this section by a duly appointed labor organization shall not include deductions from a workman's wages for the purpose of funding union job targeting programs, bid supplement programs, market recovery programs, industry advancement programs, or any other form of deduction from workman's wages that may revert back to the benefit of any employer.**

2. It shall be unlawful for any employer to submit for a bid for or perform work on the construction of public works contemplated in sections 290.210 to 290.340 where such bid or work performance includes, directly or indirectly, any wage subsidies, bid supplements, or rebates from any employees or labor organizations on such construction project or any other project from any third party, in whole or in part, to subsidize any costs on the construction project.

290.326. No public body, officer, official, member, agent, or representative authorized to contract for public works shall award a contract for the construction of such improvement or disburse any funds on account of the construction of such public improvement unless such public body first has received from the contractor or subcontractor who will perform the work an affidavit stating that he will not participate, either directly or indirectly, in any union job targeting programs, bid supplement programs, market recovery programs, industry advancement programs,

or any other program or device providing wage subsidies, bid supplements, or rebates that would subsidize the labor costs on the project. Any contractor or subcontractor who submits a false affidavit as required shall be in violation of this section.

290.340. 1. Any officer, official, member, agent or representative of any public body, contractor or subcontractor who willfully violates and omits to comply with any of the provisions and requirements of sections 290.210 to 290.340, **excluding subsection 2 of section 290.305 and section 290.326**, shall be punished for each violation thereof by a fine not exceeding five hundred dollars, or by imprisonment not exceeding six months, or by both such fine and imprisonment. Each day such violation or omission continues shall constitute a separate offense as contemplated by this section.

2. Any employee, officer, official, member, agent, or representative of any contractor, subcontractor, labor organization, or third party who willfully violates and omits to comply with any of the provisions and requirements of subsection 2 of section 290.305 and section 290.326 or acts in concert with another in the commission of conduct that violates said sections shall be punished for each violation by a fine of one thousand dollars, by imprisonment not exceeding six months, or by both such fine and imprisonment for each separate offense. Each day such violation or omission continues shall constitute a separate offense as contemplated by this section.

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